

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY
OPINION REGARDING
CONSTITUTIONALITY OF 2005 PA 71.

SC: 130589

**BRIEF OF ATTORNEY GENERAL
OPPOSING CONSTITUTIONALITY OF 2005 PA 71**

Oral Argument Requested

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Dated: July 19, 2006

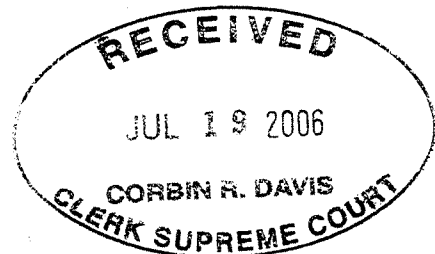


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STATEMENT OF JURISDICTION

This Court does not have jurisdiction to issue an advisory opinion on the question presented. Const 1963, art 3, § 8 specifically limits the Supreme Court's authority to issue an opinion as to the constitutionality of legislation to the time period "after [the legislation] has been enacted into law but before its effective date." The photo identification requirements legislation was enacted into law by 1996 PA 583 and became effective March 31, 1997. Neither the subsequent reenactment of the same photo identification requirements in 2005 PA 71 nor the January 27, 1997 Attorney General Opinion operates to change this legislation's effective date of March 31, 1997. Consequently, the time period during which this Court is constitutionally authorized to issue an advisory opinion on this question has expired. See, Argument I

STATEMENT OF QUESTION

Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?

STATEMENT OF FACTS

On April 26, 2006 this Court issued an order granting a request from the Michigan House of Representatives for an advisory opinion on the constitutionality of the photo identification requirements contained in 2005 PA 71. The Court directed the clerk to schedule oral argument and have it submitted as a calendar case. The Court requested the Attorney General to submit separate briefs arguing that the photo identification requirements of 2005 PA 71 are, and are not, constitutional.

This Brief of the Attorney General Opposing Constitutionality of 2005 PA 71 is submitted in accordance with that Order.

ARGUMENT

I. This Court lacks the constitutional authority to issue an advisory opinion as requested by the House of Representatives. The Michigan Constitution of 1963, art 3, § 8, specifically limits this Court's authority to issue an opinion as to the constitutionality of legislation to the time period "after [the legislation] has been enacted into law but before its effective date." Section 523, the photo identification requirement legislation, on which this Court's opinion has been requested, was enacted into law by 1996 PA 583 and became effective March 31, 1997. Neither Section 523's subsequent reenactment in 2005 PA 71 nor the January 27, 1997 Opinion of the Attorney General operates to change Section 523's effective date of March 31, 1997. Consequently, the time period during which this Court is constitutionally authorized to issue an advisory opinion has expired.

A. Standard of Review.

Issues of constitutional construction are questions of law that are reviewed *de novo*.¹ In construing a constitutional provision a court must give the words their plain meaning.²

B. This Court has strictly construed the language of Const 1963, art 3, § 8 and has accordingly denied requests for an advisory opinion as to the constitutionality of legislation when those requests were not made during the time period specified in that constitutional provision.

This Court's jurisdiction to issue advisory opinions under Const 1963, art 3, § 8 is not plenary but instead is circumscribed. By its express terms that constitutional provision limits the authority of this Court to issue an advisory opinion by specifying the time period during which this Court may issue such an opinion. The window of time during which this Court may issue an advisory opinion begins when the legislation is enacted and ends with that legislation's effective date. This is plainly stated in Const 1963, art 3, § 8:

Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation *after it has been enacted into law but before its effective date*. [emphasis added]

¹*City of Taylor v Detroit Edison Co*, 475 Mich 109, 715; 715 NW2d 28 (2006).

²*Phillips v Mirac, Inc.*, 407 Mich 415, 422; 685 NW2d (2004).

Decisions of this Court have strictly construed the time period during which an advisory opinion may issue. Thus, a request for an advisory opinion that was made during the enactment process itself rather than after the enactment, as the Constitution requires, was denied.³

Similarly, this Court declined to issue an advisory opinion on the constitutionality of legislation that had an effective date prior to the date of transmittal of senate resolutions requesting an advisory opinion.⁴

That Const 1963, art 3, § 8 should be strictly construed is entirely consistent with its intent. As this Court noted in *In Re Constitutionality of 1977 PA 10*⁵:

Article 3, section 8 was an innovation in the 1963 Michigan Constitution, a departure from the historic judicial scheme. It provided for advisory opinions on constitutionality – judgments framed in a factual void – for guidance on "solemn" occasions, at the discretion of the Supreme Court. Clearly, the intent was for sparing resort to this mechanism."

Thus, if the request for an advisory opinion as to the constitutionality of legislation falls outside the window specified in Const 1963, art 3, § 8, this Court will lack the authority to issue an advisory opinion.

The effective date of the photo identification requirements of Section 523 was March 31, 1997, which was 90 days after the end of the 1996 legislative session. This is because 1996 PA 583, in which Section 523 is contained, was not given immediate effect. Thus, in accordance with Const 1963, art 4, § 27, the photo identification requirements did not become effective until the "expiration of 90 days from the end of the legislative session at which it was passed."

Neither the subsequent reenactment of those identical photo identification requirements in 2005

³ *In Re Constitutionality of 1975 PA 227*, 395 Mich 148, 150; 235 NW2d 321 (1975).

⁴ *In Re Constitutionality of 1975 PA 195 and 196*, 395 Mich 642; 236 NW2d 62 (1975).

⁵ *In Re Constitutionality of 1977 PA 108*, 402 Mich 83, 86; 260 NW2d 436 (1977).

PA 71 nor the Attorney General's January 27, 1997 Opinion operates to change that effective date.

- C. The voter identification provisions of Section 523, including the photo identification requirement were enacted into law by 1996 PA 583 and became effective March 31, 1997. The subsequent re-enactment of the same photo identification requirements in 2005 PA 71 does not change their date of enactment or effective date since MCL 8.3u requires that they should be construed as a continuation of such law and not as a new enactment.**

As noted by the Court in its April 26, 2006 Order the House of Representatives has requested "an advisory opinion on the constitutionality of the photo identification requirements" contained in 2005 PA 71. These photo identification requirements, however, were enacted into law by 1996 PA 583 and became effective March 31, 1997. The same photo identification requirements were then re-enacted in 2005 PA 71.

Because the photo identification requirements are the same, Michigan law requires that 2005 PA 71 should be construed as a continuation of 1996 PA 583 and not as a new enactment. This is specifically set forth in MCL 8.3u that provides:

The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. If any provision of a law is repealed and in substance re-enacted, a reference in any other law to the repealed provision shall be deemed a reference to the re-enacted provision.

Since 2005 PA 71, insofar as the photo identification requirements are concerned, cannot be construed as a new enactment it follows that the effective date of those photo identification requirements thus corresponds to the effective date of 1996 PA 583 and not 2005 PA 71. In other words, the effective date of the photo identification requirements is not January 1, 2007, which is the effective date of 2005 PA 71, but rather March 31, 1997, the effective date of 1996 PA 583.

D. The Attorney General's January 27, 1997 Opinion's determination that the photo identification requirement was unconstitutional, although binding upon State agencies, does not have the force of law and, therefore, does not change the March 31, 1997 effective date of the photo identification requirements legislation.

In the event that it is argued that the January 27, 1997 Attorney General Opinion somehow changed or altered the March 31, 1997 effective date of the photo identification requirements it is clear that such an argument is without merit.

Attorney General Opinions are binding on State agencies for limited purposes only until the Courts make a pronouncement on the issue. Under MCL 14.32 the Attorney General has the "duty..., when required, to give his opinion upon all questions of law submitted to him by the legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer."

Shortly after the enactment of Section 523, which was part of 1996 PA 583, State Representative Curtis Hertel requested an opinion from Attorney General Frank J. Kelley on whether that Section 523 was constitutional. Specifically Representative Hertel asked whether Section 523, which requires either the production of a picture identification card or the execution of an affidavit that the elector does not possess such a card before being able to vote, violates the Equal Protection Clause of the Fourteenth Amendment.

On January 29, 1997 Attorney General Kelley issued a formal opinion finding that Section 523 was unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment.⁶ The Attorney General's opinion was issued in advance of the March 30, 1997 effective date of Section 523. As a result Section 523 was never implemented.

⁶ 1997-1998 OAG, No 6930, p 1 (January 29, 1997).

Section 523 was never enforced by the Michigan Secretary of State because the opinion of the Attorney General is binding only upon State departments.⁷ Thus, while Section 523 was never implemented in 1997 due to the Attorney General's opinion, which was binding on State agencies, that Attorney General opinion did not change Section 523's effective date of March 31, 1997. Consequently, under Const 1963, art 3, § 8, the time period during which this Court is authorized to issue an advisory opinion has expired.

⁷ *Campbell v Patterson*, 724 F2d 41, 43 (CA 6, 1983); *People v Waterman*, 137 Mich App 429, 439; 358 NW2d 602 (1984); *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 522-523; 343 NW2d 601 (1983); *Arrowhead Development Co v Livingston County Road Comm'n*, 92 Mich App 31, 37; 283 NW2d 865 (1979); *Reinelt v Michigan Public School Emp Retirement Bd*, 87 Mich App 769, 774; 276 NW2d 858 (1979); *East Grand Rapids School Dist v Kent County Allocation Bd*, 415 Mich 381, 394; 330 NW2d 7 (1982).

II. Section 523 infringes on the fundamental right of voting, which is preservative of all other rights, by classifying and differentially treating otherwise eligible voters based on their ability to meet a photo identification requirement. Restrictions on voting are subject to a strict scrutiny analysis if they impose a severe burden on the right to vote. Given that Section 523 severely burdens the right to vote and exacerbates that burden by triggering a challenge process when no photo identification is presented, Section 523 cannot be sustained under applicable constitutional scrutiny.

A. Standard of Review.

Constitutional issues are subject to *de novo* review.⁸

In its April 26, 2006 order granting the request for an advisory opinion this Court framed the question asking whether Section 523's photo identification requirements, *on their face*, violate the Michigan or United States Constitution. This Court, adopting the standard employed by the U.S. Supreme Court with respect to facial challenges, has held that a party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the act would be valid" and the "fact that the act might operate unconstitutionally under some conceivable set of circumstances is insufficient."⁹ While this standard is a stringent one, a leading commentator has noted that the incidence and success of facial challenges are not governed by any general formula defining the conditions for a successful facial challenge but instead the availability of facial challenges varies on a doctrine-by doctrine basis and is a function of the applicable substantive tests of constitutional validity.¹⁰

A valid facial challenge is a challenge to a statute based on a constitutional infirmity evident in the written words of the statute itself. Thus, the question whether the statutory terms themselves trigger constitutional scrutiny under the applicable doctrinal test will depend on the

⁸ *Wayne County v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

⁹ *Council of Organizations About Parochiaid v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997); quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

¹⁰ Fallon, *As-Applied And Facial Challenges And Third-Party Standing*, 113 Harv L Rev 1321, 1324 (2000).

relationship between the content of the statutory terms and the underlying substantive constitutional law.¹¹ In the equal protection context, the underlying constitutional doctrine not only supplies a doctrinal test for any statutory distinction among classes of people but also for statutes that, by their own terms, burden a fundamental right.¹² Because Section 523, as discussed herein, burdens a fundamental right – voting – and because it involves a distinction among classes of people – i.e., those who possess photo identification and those who do not – a valid facial challenge is established which, in turn, is adjudged through the applicable doctrinal tests.

B. The right to vote is a constitutionally protected fundamental right.

The Fourteenth Amendment of the United States Constitution, which affords inherent protections to the fundamental rights of all of its citizens, that includes the right to vote, provides¹³:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Michigan Constitution of 1963 similarly guarantees Michigan citizens equal protection of the laws¹⁴:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The Legislature shall implement this section by appropriate legislation.

¹¹ Isserles, *Overcoming Overbreadth: Facial Challenges And The Valid Rule Requirement*, 48 Am U L Rev 359, 430 (1998).

¹² *Id* at 430-431, n316 citing *Shapiro v Thompson*, 394 US 618, 638; 89 S Ct 1322; 22 L Ed 2d 600 (1969); *Harper v Virginia Bd of Elections*, 383 US 663, 668; 88 S Ct 1079, 16 L Ed 2d 169 (1966).

¹³ US Const, Am XIV, § 1.

¹⁴ Const 1963, art 1, § 2.

This Court has interpreted the Michigan Constitution's equal protection guarantee to be coextensive with the United States Constitution's equal protection clause.¹⁵

Voting is "a fundamental right."¹⁶ It is a "fundamental political right because [it is] preservative of all rights."¹⁷ The United States Supreme Court has consistently recognized the paramount importance of this right, holding that "other rights, even the most basic, are illusory if the right to vote is undermined."¹⁸

The Michigan Supreme Court has consistently recognized the significance of this right over all other fundamental rights, proclaiming that "the right to vote is one of the most precious, if not the most precious, of all our constitutional rights."¹⁹ In *Wilkins v Bentley*, this Court invalidated a statute that precluded students who matriculated at Michigan institutions of higher education from being considered State residents, thereby preventing them from registering to vote in the State. The Court found that the statute placed a burden on the students' right to vote, and therefore, violated the Equal Protection Clause of the Fourteenth Amendment and Const 1963, art 1, § 2.²⁰ This Court held that the Equal Protection Clause "guards against subtle restraints upon the right to vote, as well as an outright denial."²¹ Because the right to vote in a free and unimpaired manner is preservative of other basis civil and political rights, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."²²

¹⁵ *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003).

¹⁶ *Reynolds v Sims*, 377 US 533, 561-62; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

¹⁷ *Yick Wo v Hopkins*, 118 US 356; 6 S Ct 1064; 30 L Ed 220 (1886).

¹⁸ *Wesberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964).

¹⁹ *Wilkins v Bentley*, 385 Mich 670, 680; 189 NW2d 423 (1971).

²⁰ *Wilkins*, 385 Mich at 684, 694.

²¹ *Wilkins*, 385 Mich at 684.

²² *Reynolds*, 377 US at 562.

The scope and "rigorousness of the inquiry...depends upon the extent upon which a challenged regulation burdens First and Fourteenth Amendment rights."²³

In this case, Section 523(1) severely burdens the right to vote by imposing an absolute condition on voting, and simultaneously classifying and differentially treating voters on their ability to meet that obligation.

C. A strict scrutiny analysis applies when the burden on a constitutional right is severe.

In *Burdick v Takushi*, the United States Supreme Court identified the standard to be applied in analyzing a State's imposition of a burden on constitutional rights, saying that the test is to²⁴:

weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interest put forth by the State as justifications for the burden imposed by its rule, taking into consideration the extend to which those interest make it necessary to burden the plaintiff's rights.

The Court then explained that the rigorousness of the scrutiny depends upon the degree to which the restriction burdens the right to vote. Thus, if those rights are subject to severe restrictions, "the regulation must be narrowly drawn to advance a state interest of compelling importance."²⁵ But, "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference."²⁶

In *Burdick*, the U.S. Supreme Court applied the foregoing test and held that Hawaii's prohibition on write-in voting did not violate its voters' constitutional rights. Under Hawaii

²³ *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

²⁴ *Burdick*, 504 US at 434.

²⁵ *Burdick*, 504 US at 434. The United States Supreme Court did not define what would constitute a "severe" burden. "Severe" in the dictionary is defined as "unsparing or harsh, as in the treatment of others; strict." *The American Heritage College Dictionary* (3d ed) (1977).

²⁶ *Dunn v Blumstein*, 405 US 330, 343; 92 S Ct 995; 31 L Ed 2d 274 (1972).

election law a candidate is required to participate in a new-party or nonpartisan primary election in order to obtain a position on the general election ballot. That law provided that a candidate may appear on a primary ballot by filing nominating papers, containing a specified number of voter signatures, 60 days before the primary. The Hawaii law, however, did not include write-in votes and any write-in votes would simply be ignored.²⁷ Plaintiff, a registered Honolulu voter, filed suit against defendant State officials, claiming that Hawaii's prohibition on write-in voting violated his rights of expression and association under the First and Fourteenth Amendments.

The U.S. Supreme Court in *Burdick* explained that "the rigorousness of the scrutiny depends on the degree to which the restriction burdens the right to vote."²⁸ Thus the "state's important regulatory interests are generally sufficient" only when "reasonable, non discriminatory" regulations are at issue; more pervasive or severe restrictions warrant strict scrutiny.²⁹ The Court found that the burden on voters' freedom of choice and association was a very limited one, given that the State provided for easy access to the ballot, and there was nothing content-based about a flat ban on all forms of write-in ballots. The prohibition on write-in voting promoted the State's legitimate interests and such State interests outweighed a voter's limited interest in waiting until the eleventh hour to choose a candidate. The Court held that for the purpose of the First and Fourteenth Amendments, Hawaii's prohibition on write-in voting and the requirement that a candidate participate in the open primary in order to obtain a position on the general election ballot, did not unconstitutionally limit access to the ballot by party or

²⁷ *Burdick*, 504 US at 435-37.

²⁸ *Burdick*, 504 US at 435.

²⁹ *Burdick*, 504 US at 434.

independent candidates, and did not unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot.³⁰

Although the lawsuit in *Burdick* was brought by a voter who claimed Hawaii's prohibition on write-in voting violated his constitutional rights, it is important to note that the Court's opinion is fundamentally about a *candidate's* access to the ballot. It was not about a *voter* being denied an equal chance to have her vote counted. In *Burdick*, Hawaii provided easy access to the ballot. There were three mechanisms through which a voter's candidate-of-choice could appear on the primary ballot. *Burdick* did not impose a prohibition on voters' rights; it only proscribed the "time, place and manner" of voting. The restriction in *Burdick* was a minor burden rather than a severe burden.

D. The burden imposed by Section 523 is severe because it places those persons not having photographic identification into a separate classification and unreasonably subjects those persons to challenges from election officials and others in which the criteria for challenges is arbitrary.

Unlike *Burdick*, Section 523, on its face, discriminates against, and automatically places into a separate classification, and affords different treatment to those persons who lack photo identification. This is because having government-issued photo identification or certain undefined photo identification is the only means by which an otherwise qualified registered voter can gain free and unfettered access to the ballot box.

Not all qualified voters have photo identification. It is simply incorrect to either assume that they do or that the cost – either in terms of dollars or effort – is reasonable. Moreover, the photo identification requirement is facially discriminatory since it will have its most pronounced effect on those who are the most susceptible to intimidation, i.e., the very poor, racial and ethnic minorities, elderly, and the disabled. Clearly there is a segment of society who either lack the

³⁰ *Burdick*, 504 US at 442-43.

financial resources to obtain a government issued photo identification or for whom obtaining such photo identification may be difficult. Nor is this segment of society an insignificant one. According to Michigan's Director of Elections, approximately 8% of Michigan's voting age population does not have a Michigan driver's license or identification card.³¹ This translates into hundreds of thousands of otherwise eligible voters who could potentially be denied the right to vote. Section 523 thus discriminates against these classes of individuals by effectively making them pay a fee to vote and is tantamount to a poll tax. See Argument VI, *infra*. Therefore, unless they obtain photo identification they're placed into a different classification and become subject to challenge. In short, they become second-class citizens.

While voters who lack photo identification may ultimately be allowed to sign an affidavit, there is no guarantee of how long they will endure questioning before being able to do so, nor is it at all clear what questions they may be required to answer. Thus, unlike *Burdick*, Section 523 imposes a severe burden on a voter's fundamental rights and should be subject to strict scrutiny.

1. The Affidavit Provision of Section 523 is unduly burdensome.

The affidavit requirement of Section 523(1) does not alleviate the severe burden imposed. Its effect is actually the opposite, since it will be used to trigger challenges by election officials and others that voters with photo identification will simply not be subjected to. Plainly stated, persons without photo identification are treated quite differently. When applied to such a fundamental right as voting, the burden imposed is severe.

³¹ *Bay County Democratic Party v Land*, 347 F Supp 2d 404 (ED Mich 2004)(citing Affidavit of Christopher M. Thomas).

MCL 168.523(1), as re-enacted in 2005 PA 71, in pertinent part, provides³²:

If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in § 727.

Since the photo identification requirements have yet to be enforced, Section 523 contains no guide or criteria as to what is required of the voter signing the affidavit or what type of questions the voter will be subjected to. Indeed, the Secretary of State has not promulgated any regulations to ensure a uniform application of the photo identification requirements.

If a voter is allowed to sign an affidavit, the election official can challenge the voter. The challenge procedure is set forth in MCL 168.727. Under Section 727(1), a voter may be challenged not only by an inspector but also by a designated challenger on the following grounds:

- if the challenger "knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct" or
- if "a challenge appears in connection with the applicant's name in the registration book" or
- iii. if the voter "has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot."

³² This language, enacted in 1996 PA 583, was not changed in the 2005 amendment, 2005 PA 71.

Challenges must be individualized and for cause. Blanket challenges are not permitted.³³

See also, Election Inspectors' Procedure Manual (June 2004), p.11.³⁴

It is likely that election inspectors and challengers will find a voter's lack of photo identification as sufficiently "good reason" to question the voter's qualification to vote. Furthermore, although the Manual says that a challenger "should" know before election-day the voters whom he or she intends to challenge, this is not required. In any event, the Secretary of State has not provided any guidance as to whether or not the use of an affidavit procedure automatically constitutes a basis for challenge.

The challenge procedure's discretionary nature results in a severe burden to registered voters lacking photo identification. Challenges are resolved at the polling place, with the voter

³³ MCL 168.727(3): "A challenger shall not make a challenge indiscriminately and without good cause. A challenger shall not handle the poll books while observing election procedures or the ballots during the counting of the ballots. A challenger shall not interfere with or unduly delay the work of the election inspectors. An individual who challenges a qualified and registered elector of a voting precinct for the purpose of annoying or delaying voters is guilty of a misdemeanor." *See also*, MCL § 168.733(1)(c) ("A challenger may do 1 or more of the following...(c) Challenge the voting rights of a person who the challenger has good reason to believe is not a registered elector.")

³⁴ The Manual states: "A challenge is **proper** if it is based on information obtained by the challenger through a reliable source or means. For example, the challenger has obtained information that a particular voter 1.) is not a true resident of the jurisdiction 2.) has not yet attained 18 years of age 3.) is not a United States citizen or 4.) did not register to vote on or before the 'close of registration' for the election at hand. A challenger should know the specific individuals he or she intends to challenge **before the polls open on election day**. A challenge is **improper** if it is **not** based on information obtained by the challenger through a reliable source or means. For example, a challenger does not have the right to issue a challenge based on an 'impression' that the voter may not be eligible to vote in the precinct due to the voter's manner of dress, inability to read or write English, perceived race or ethnic background or need for assistance with the voting process. Similarly, a challenger does not have the right to issue a challenge due to any physical or mental disability the voter may have or is perceived to have." (See Appendix A, Manual, p.11, emphasis in original.)

either being permitted to cast a ballot or not being permitted to cast a ballot.³⁵ If the challenge is based on the voter's qualifications, such as when no photo identification is produced, the person is asked to swear or affirm that he or she will answer all questions truthfully.³⁶ If an applicant should refuse to take the oath, he or she will not be permitted to vote. If the applicant chooses to take the oath, the precinct captain or a designated inspector must question the applicant. Questions are supposed to be confined to the person's qualifications (citizenship, age, and residency). The inspector, at that time, based on the prospective voter's answers, must determine whether that person is qualified to vote.

The challenged voter's ballot is handled by marking the voter's number on the back of the ballot and concealing it with tape or paper. The ballot is then deposited in the ballot box.³⁷ The inspector records the challenged voter's name and the details surrounding the challenge in a

³⁵ MCL 168.728: "If at the time a person proposing to vote is challenged, there are several other persons awaiting their turn to vote, said **challenged person shall stand to one side until after unchallenged voters have had the opportunity to vote, when his case shall be taken up and disposed of.**" (Emphasis added)

MCL 168.729: "If any person attempting to vote is challenged as unqualified, he shall be sworn by 1 of the inspectors of election to truthfully answer all questions asked him concerning his qualifications as an elector and any inspector or qualified elector at the poll may question said persons to such qualifications. if the answer to such questions show that said person is a qualified elector in that precinct, he shall be entitled to receive a ballot and vote. Should the answers show that said person is not a qualified elector at that poll, he shall not be entitled to receive a ballot and vote. If any one of his answers concerning a material matter shall not be true, he shall, upon conviction, be deemed guilty of perjury."

MCL 168.736: "When an elector applying to vote shall not be challenged, or, having been challenged, if the answers to questions asked him while under oath as to his qualifications shall show that he is a qualified elector at the poll, he shall be permitted to vote.***"

³⁶The oath states: "I swear (or affirm) that I truly will answer all questions put to me concerning my qualifications as a voter." (See Appendix A, Manual, p. 12.)

³⁷ MCL 168.745, 168.746; (See Appendix A, Manual, p.12.

separate section of the poll book.³⁸ Challenged ballots are for all purposes treated and counted the same as unchallenged ballots.³⁹

The obstacles that those voters, who do not possess photo identification face, are formidable and time-consuming. It can be expected that the photo identification requirement for voting will be exploited and that voters using the affidavit procedure will be rigorously challenged. Those challenged voters will be subject to questioning under oath in order to establish their eligibility to vote. But it is not clear what kind of residency information voters will need to present in order to defeat the challenge and thus obtain their right to vote. Moreover, the challenge process will vary since it is completely discretionary based on the judgment of election inspectors who decide the challenges. Significantly, the Election Code does not provide any right of appeal or offer any other recourse if the voter is successfully challenged. Thus, the effect of Section 523 is that a person may be denied a fundamental right, without recourse.

The challenge process will irrefutably delay voters not having photo identification (see MCL 168.728, see fn. 38), who in many cases may just give up rather than undergo the inconvenience, embarrassment and additional delay of the challenge. Those who have either misplaced or forgotten to bring their photo identification to the polls will be discouraged and may not be able to return to the polls. It can also be anticipated that many voters will be uninformed and not be aware of the need to have photo identification in order to vote.

³⁸ MCL 168.727(2), 168.745.

³⁹ The only exception appears to be in the case where a Congressional election is contested and extraordinary judicial procedures are invoked, in which case the petitioner apparently may only raise an issue as to the qualification of electors who voted a challenged ballot. MCL 168.747, 168.748, 168.749.

Depending upon the training of election inspectors, different standards for counting votes will be implemented at various polling places. Related issues may include election inspectors who are poorly trained or do not adapt well to changes in procedure. Ultimately they may turn away voters with no photo identification without offering them an opportunity to sign the affidavit. Lastly, this procedure will impact the standards for counting votes which "might vary...from county to county" and sometimes from within a single county, violating the Equal Protection Clause.⁴⁰

This affidavit and subsequent challenge procedure will severely and disproportionately burden poor voting districts. Section 523(1) has a broad and pervasive application, and jeopardizes a fundamental right of a significant segment of the voting population. Since Section 523(1) severely burdens the constitutionally protected and fundamental right to vote, the State's interest must not only advance a compelling State interest, but also the method employed in furtherance of that interest must be narrowly drawn.

2. The severe burden imposed by Section 523 is unconstitutional because the State has failed to demonstrate a compelling interest.

The State must demonstrate an interest sufficiently urgent in order to constitutionally sustain a severe burden on a voter's rights. "Administrative convenience is simply not a compelling justification in light of this fundamental nature of the right."⁴¹ The issue that the State seeks to address in this case is the prevention of voter fraud at the polling stations. As recently as 2004, in *Bay County Democratic Party v Land*, the U.S. District Court, citing Attorney General Opinion No. 6930, concluded that "Michigan enjoys an election history that is

⁴⁰ *Bush v Gore*, 531 US 98, 106; 121 S Ct 525; 148 L Ed 2d 388 (2000).

⁴¹ *Fronterio v Richardson*, 411 US 677, 690, 93 S Ct 1764; 36 L Ed 2d 583 (1973).

relatively fraud-free."⁴² This conclusion was based on a statement made by former Michigan Secretary of State Candace Miller in 1997.

The current Michigan Secretary of State Terri Lynn Land, however, has asked the Michigan Attorney General to reconsider the implementation of Section 523. But her April 20, 2006 letter fails to point out any voter fraud that would be cured by Section 523.⁴³ In her letter, Secretary Land speaks in general terms about a need to implement Section 523 in order to "further protect against the potential for voter fraud."⁴⁴ Secretary Land lists the following examples of voter fraud in Michigan that would be addressed by implementing the photo identification requirements of Section 523⁴⁵:

In the 2004 election year the Bureau of Elections received, investigated, and substantiated reports of fraudulent voter registrations from Wayne, Oakland, Ingham, and Eaton Counties. Unfortunately voter confidence in the electoral process took another hit during the 2005 election in the City of Detroit, which resulted from lawsuits and litigation surrounding voting practices in that municipality.

As with the anecdotal examples cited by Representative Ward (see *infra*) in support of implementing Section 523, Secretary Land's examples have little to do with preventing voter impersonation fraud at the polls. Her statements regarding fraud in voter registration are unrelated to impersonation fraud at the polls. Thus, the photo identification requirements of Section 523 will not remedy the situation fraud the Secretary of State describes. Similarly, the situation involving the "2005 election in the City of Detroit," related to voter fraud involving absentee ballots. Again the implementation of fraud Section 523 will do nothing to remedy absentee ballot fraud problem that Secretary Land refers to in her letter.

⁴² *Bay County Democratic Party v Land*, 347 F Supp 2d 404, 437 (ED Mich 404).

⁴³ Michigan Secretary of State Terri Lynn Land's letter to Michigan Attorney General Mike Cox dated April 20, 2006. (See, Appendix B).

⁴⁴ Appendix B, p. 1.

⁴⁵ Appendix B, p. 1.

When compared to absentee voter fraud, voter fraud at the polling station is very rare.⁴⁶ Experts who have studied voter fraud have noted that the incidence of individual voter fraud at the polls is negligible.⁴⁷ Similarly, the risk of prosecution associated with absentee voter fraud is very low. In contrast there is a high risk associated with in-person voter fraud, including criminal prosecution.⁴⁸

Absentee voting is where most voter fraud is found. State Representative Chris Ward, in his request to Attorney General Cox for a formal opinion on the constitutionality of Section 523(1), cited four anecdotal examples of voter fraud as justification for requiring photo identification at the polls⁴⁹:

- Ecorse: Three former members of the Ecorse City Council pled guilty to several felony counts of election fraud in December 2003. The charges included conspiracy, vote tampering, and *improper possession of absentee ballots*.
- River Rouge: A River Rouge resident pled guilty to multiple charges of absentee ballot tampering and *improper possession of absentee ballots* in February 2004.
- Benton Harbor: In April 2005, a Berrien county judge invalidated a recent recall election after finding that the election results were tainted by a vote-buying scheme, *improprieties in the distribution and tabulation of absentee ballots*, and deliberate efforts by some to vote more than once. A criminal investigation is ongoing.
- Statewide: Secretary of State Land warned local clerk that "there have been numerous instances of *falsified mail-in voter registration applications* being submitted to clerks throughout the state." The Secretary's announcement was made only weeks before the 2004 general election. [emphasis added]

⁴⁶ L. Minnite & D. Callahan, *Securing the Vote: An Analysis of Election Fraud*, 4, 17 (2003), available at http://demos-USA.org/pubs/EDR-Securing_the_Vote.pdf.

⁴⁷ L. Minnite & D. Callahan, *Securing the Vote: An Analysis of Election Fraud* (2003).

⁴⁸ See MCL 168.499(1), 931, 932 and 932a.

⁴⁹ Michigan Representative Chris Ward's letter to Attorney General Mike Cox dated July 13, 2005. (See, Appendix C).

Of Representative Ward's four anecdotal examples, three of them directly involve instances of fraud in *absentee voting*. Fraud in absentee voting is an issue entirely separate from fraud at the polls. As for falsified mail-in voter registration applications, these incidents have no correlation with voter fraud at the ballot box and everything to do with training staff to identify suspicious mail-in voter registration applications. Ironically, Section 523 places a significantly greater burden upon voters seeking to exercise their constitutional right to vote at the polls than it does upon a person seeking to register to vote, because any Michigan citizen of appropriate age may register to vote without showing photo identification.⁵⁰ In essence, Section 523 seeks to prevent fraud at the polling booth which is virtually non-existent in Michigan, while doing nothing to prevent fraud in absentee voting, where fraud is known to exist. Such an illusory link between the State's interests in preventing voter fraud at the polling booth can not withstand either a "rational basis" or a "strict scrutiny" analysis.

Despite offering no compelling justification for Section 523, the State is required to utilize the least restrictive means in furthering its interest.⁵¹ But an effective framework for detecting and deterring voter fraud is already in place in Michigan. As noted previously, criminal sanctions are in effect, which make it a four-year felony to vote or attempt to vote by impersonating another, or by assuming a false name.⁵² Additionally, identification requirements under Help America Vote Act of 2002, Pub L No 107-252, 116 Stat 1666; 42 USC 15301, *et seq.* (HAVA) also reduce the likelihood of voter impersonation. Section 303(b) of HAVA, ostensibly included the Act to minimize voter fraud, outlines minimum requirements for identification of voters who register by mail, including presentation of photographic

⁵⁰ MCL 168.499

⁵¹ *Dunn v Blumstein*, 405 US at 343.

⁵² MCL 168.932(a).

identification.⁵³ Section 303(b) also authorizes numerous alternatives, however, such as a "current utility bill, bank statement, government check, paycheck, or other governmental document that shows the name and address of the voter."⁵⁴

In 2004, in response to concerns about election fraud, Michigan Secretary of State Land commented that⁵⁵:

We have a number of checks and balances inherent in the process to prevent 'fake people' from voting...We do believe the safeguards in place will protect the integrity of the election.

Moreover, it is important to recognize that the photo identification requirements were enacted in 1996 PA 583 and became effective March 31, 1997. The record is clear that at the time of their enactment there was no reasonable basis to conclude that there was a voter fraud problem at the polls. The subsequent re-enactment of those photo identification requirements does not change the fact that at the time when these photo identification requirements took effect the State was unable to demonstrate a compelling interest.

Thus, absent any compelling State interest to prevent voter impersonation at the polls, and given that Section 523 severely burdens the fundamental right to vote, Section 523 violates the Equal Protection clause by classifying and differentially treating otherwise eligible voters, based on their ability to meet a photo identification requirement. A survey of those cases in which strict scrutiny was applied when compared to those case where strict scrutiny was not applied illustrate the unconstitutional nature of Section 523.

⁵³ 42 USC § 15483(b).

⁵⁴ 42 USC § 15483(b)(2)(i)(II).

⁵⁵ C. Selweski, "Flood of Voter Registrations Raises Specter of Election Fraud" *The Macomb Daily* (September 20, 2004). (See, Appendix D).

E. Cases following *Burdick* that apply strict scrutiny on the limitations of voting rights are similar to the degree of burden imposed by Section 523.

In *Common Cause/Georgia v Billups*, a federal district court struck down a Georgia statute requiring voter Photo identification under a strict scrutiny analysis.⁵⁶ The court found that, while preventing voter fraud is a legitimate concern, the statute must be narrowly drawn.⁵⁷

In 1997, the Georgia General Assembly adopted O.C.G.A. § 21-2-47, which required registered voters in Georgia to identify themselves by presenting one of seventeen forms of identification, including a birth certificate, a social security card, a copy of a current utility bill, a government check, a payroll check, or a bank statement showing the voter's certificate, to election officials as a condition of being admitted to the polls and of being allowed to vote. However, in 2005, the Georgia General Assembly adopted House Bill 244, or Act 53. This amendment required all Georgia voters, voting in person, to present a government-issued photo identification to election officials in order to cast their vote. This new photo identification requirement applied only to registered voters who vote in person, but did not apply to absentee voters, except those voting absentee for the first time after registering by mail.⁵⁸

In granting plaintiffs' motion for preliminary injunction, the federal district court found that the Georgia Photo ID requirement failed to meet constitutional muster and had an adverse impact on various groups⁵⁹:

Given the fragile nature of the right to vote, the Court finds that the Photo identification requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo identification for whom obtaining a Photo identification would be a hardship. Unfortunately, the Photo identification requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting. For those citizens, the character and magnitude of their injury – the loss of their right to vote

⁵⁶ *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326 (SD Ind 2005).

⁵⁷ *Common Cause*, 406 F Supp 2d at 1362-63.

⁵⁸ *Common Cause*, 406 F Supp 2d at 1331.

⁵⁹ *Common Cause*, 406 F Supp 2d at 1366.

– is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.

The Court's decision in *Common Cause* is based on sound and pertinent facts, and properly addresses potential undue hardships that face many impoverished citizens that would otherwise be able to vote.⁶⁰

Like *Common Cause*, Section 523 imposes a photo identification-only requirement for voters, and allows no alternative forms of identification. Both Section 523 and the Georgia statute require photo identification to vote in person, but not for absentee voting. Like Georgia, there has been no evidence of voter impersonation fraud in Michigan, while the same can not be said about the absentee ballot process.⁶¹ Like *Common Cause*, the photo identification-only requirement in the present case is not narrowly tailored to serve its stated purposes—preventing voter fraud. Under the guise of preventing voter fraud, Section 523 will have the effect of suppressing the voting rights of minorities, the poor, the disabled and the elderly since they are less likely to possess photo identification or have means to obtain the photo identification required to vote.

In another significant way, Section 523 is even more restrictive than the Georgia statute that was struck down for being too restrictive and not narrowly tailored to the State of Georgia's interest. In Georgia, individuals without a photo ID could obtain such identification free of charge from the State Department of Driver Services ("DDS") Office, the Georgia Licensing on

⁶⁰ Since the decision in *Common Cause*, *supra*, the Georgia Assembly modified the identity verification process in an effort to address the 11th Circuit's concerns, in effect, making the ruling moot. See 2006 Amendment to O.C.G.A. § 21-2-47. However, on July 7, 2006, ruling that the voter identification law was an undue burden on the paramount right to vote, the Superior Court of Fulton County, Georgia, issued a Temporary Restraining Order enjoining the State Governor and State Election Board from requiring voters to produce photo-identification of any kind required by either version of Georgia's new law. See *Rosalind Lake v Hon Sonny Perdue et al*, File No. 2006CV119207, Temporary Restraining Order at 4, July 7, 2006.

⁶¹ See Argument II.D.2, *supra*.

Wheels ("GLOW") Bus, or other organizations serving indigent clients by completing an Affidavit for Identification Card for Voting Purposes.⁶² Section 523, however, does not afford Michigan citizens the option to obtain free photo identification. In order to obtain photo identification under Section 523 a citizen will have to pay money, as well as secure transportation to a local Secretary of State office.

Another case that is analogous to this case is the decision of the United States Court of Appeals for the Sixth Circuit in *Stewart v Blackwell*, that held that the use of error-prone voting equipment deprived eligible voters of equal protection.⁶³ The court found that under either strict scrutiny or rational basis scrutiny this violation of equal protection was unconstitutional. "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted."⁶⁴ The *Stewart* court applied a strict scrutiny test to strike down the restrictions on voting imposed by the voting technology.

The instant case is similar to *Stewart* in that a strict scrutiny analysis should apply. It is important to point out that *Stewart*, however, relied heavily on Sixth Circuit precedent and noted that "we easily conclude that the right to have one's vote counted on equal terms is part of the right to vote."⁶⁵ Like the new voting technology that resulted in uncounted votes and thus violated equal protection, Section 523 would discriminate against eligible voters who currently do not have a photo identification and result in "standards...that might vary...from county to county, [and thus] violate the Equal Protection clause."⁶⁶

⁶² *Common Cause*, 406 F Supp 2d at 1338-39.

⁶³ *Stewart v Blackwell*, 444 F3d 843 (CA 6, 2006).

⁶⁴ *Stewart*, 444 F3d at 10.

⁶⁵ *Stewart*, 444 F3d at 20.

⁶⁶ *Stewart*, 444 F3d at 14.

- F. The cases following *Burdick* that did not use strict scrutiny are distinguishable, as they consistently provided the use of alternative methods of identification besides photo identifications, or allowed voters to obtain photo identification for free, or exempted certain persons to who the photo identification requirement would be an impermissible barrier.**

The cases following *Burdick* that did not use strict scrutiny had a very narrow and limited application, which did not significantly affect access to the ballot, but instead largely dealt with the implementation of the interim ballot provisions of HAVA. Section 523, by contrast, affects every single Michigan citizen who votes in person. In particular, the requirements challenged in *Bay County Democratic Party v Land*,⁶⁷ *The League of Women Voters v Blackwell*⁶⁸ and *Colorado Common Cause v Davidson*⁶⁹ allowed voters to produce alternative forms of identification as well as photo identifications. Finally, the decision in *Indiana Democratic Party v Rokita*, completely exempted a group of individuals from a photo identification requirement, recognizing that it would present an impermissible barrier to some voters.⁷⁰

1. *Bay County Democratic Party v Land*.

Bay County Democratic Party involved a challenge to the directives issued to Michigan local elections officials in Michigan concerning casting and tabulating provisional ballots, as well as a directive pertaining to proof of identity for first-time voters who registered by mail⁷¹:

Any sensible laws regulating the time, place and manner of voting in a democracy ought to focus on two goals: maximizing the participation of eligible voters and eliminating fraud. However, these goals often are in tension, since regulations that guard against fraud may also raise barriers so high that some eligible voters may not be able to pass.

The directive concerning proof of identity for first-time in-person voters who registered by mail was revised to allow those voters to furnish the identification required by HAVA either

⁶⁷ *Bay County Democratic Party v Land*, 347 F Supp 2d 404 (ED Mich 2004).

⁶⁸ *The League of Women Voters v Blackwell*, 340 F Supp 2d 823 (ND Ohio 2004).

⁶⁹ *Colorado Common Cause v Davidson*, 2004 WL 2360485 (Colo Dist Ct 2004).

⁷⁰ *Indiana Democratic Party v Rokita*, 2006 US Dist LEXIS 20321(2006).

⁷¹ *Bay County*, 347 F Supp 2d at 411.

at the polls or during a six-day period after election day.⁷² The permissible forms of identification were those required by HAVA. The HAVA requirements allowed first-time voters who registered by mail to present a current, valid photo identification or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”⁷³ Under the Michigan statute, if a first-time voter who registered by mail cannot comply with HAVA's § 303(b)(2)(A)(i) requirement at the polls on election day, that person may cast a provisional ballot, which will be tabulated if the person can furnish the requisite identification within six days thereafter.

In *Bay County Democratic Party*, the plaintiffs did not show that the regulations were discriminatory or were likely to be applied unevenly. Nor did they assert that the identification requirements prescribed by HAVA, after which State statute was modeled, are unconstitutional.⁷⁴ The court held that the defendant's directive concerning the manner and means of identification by first-time voters who registered to vote by mail are consistent with federal and State law.⁷⁵ The Court stated⁷⁶:

The right to vote is clear. There is nothing vague or amorphous about a court order to permit provisional balloting or to count ballots of voters determined to be eligible to vote in the jurisdiction according to State law.

The present case is distinguishable from *Bay County Democratic Party*. The regulation in Section 523 is far broader than that in *Bay County Democratic Party*. Unlike *Bay County Democratic Party*, which applies only to first-time voters who registered by mail, Section 523 in the present case applies to every voter who seeks to cast their ballot at the polls.

⁷² *Bay County*, 347 F Supp 2d at 414-16.

⁷³ *Bay County*, 347 F Supp 2d at 413.

⁷⁴ *Bay County*, 347 F Supp 2d at 435.

⁷⁵ *Bay County*, 347 F Supp 2d at 438.

⁷⁶ *Bay County*, 347 F Supp 2d at 423.

In *Bay County Democratic Party*, the first-time voters without photo identification could also present other identification, such as a utility bill or bank statement, at the polls. However, under the photo identification only requirement of Section 523, no other alternative form of identification is acceptable. Moreover, in *Bay County Democratic Party*, even if first-time voters could not provide any acceptable identification, they could cast a provisional vote and furnish identification within six days after the election. The court in *Bay County Democratic Party* followed *Burdick* and expressed that "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions."⁷⁷ The court, however, emphasized that "having once granted the right to vote on equal terms, a State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."⁷⁸ Section 523, in this case, is more restrictive than that in *Bay County* since it imposes a burden on voters' rights that violates the Equal Protection Clause, because it values one person's vote over another's. It should therefore be subject to strict scrutiny.

2. *League of Women Voters v Blackwell*.

The *League of Women Voters* case involved a challenge to an Ohio law implementing HAVA that required first-time voters who registered to vote by mail and who did not submit acceptable documentary proof of identity with their voter applications to provide "acceptable documentary proof" of their identities prior to voting. Such proof could include "a current and valid photo identification," or "a copy of a current utility bill, bank statement, government check,

⁷⁷ *Bay County*, 347 F Supp 2d at 435.

⁷⁸ *Bay County*, 347 F Supp 2d at 435.

paycheck, or other government document that shows the voter's name and address.”⁷⁹ The court expressed how⁸⁰:

Having every ballot cast by every eligible voter is also of fundamental importance. Where persons who are eligible to vote lose faith that their ballot will count, they will conclude that voting does not matter. They may decline to exercise the franchise, thereby giving up the most fundamental right of our democracy as completely as if it had been taken from them forcibly. Loss of faith in the efficacy of the individual ballot can also erode public confidence in the integrity of elections and the validity of their outcomes.

Those first-time voters who arrive at the polling place without such documentary proof of their identity could vote provisionally, or identify himself or herself by providing his or her driver's license number or the last four digits of his or her social security number ("numerical identifier"). It is not necessary for the voter to document that number: identification by oral recitation is enough. If a first-time voter who is voting provisionally has a numerical identifier, but does not know either number, Directive 2004-7 provided that he or she could provide the numerical identifier before the polls close.⁸¹

The plaintiffs claimed that Directive 2004-7 conflicted with HAVA, and thus was invalid under the Supremacy Clause of the United States Constitution. The court applied the *Burdick* test, and after balancing two interests—avoiding fraud, and ensuring that every ballot counts—and concluded that the burden imposed on the effective exercise of the franchise by Directive 2004-7 was reasonable. The reasoning of the court was that⁸²:

Possession of a social security number is nearly universal, so the numbers of provisional voters who do not have a numerical identifier is highly likely to be very low. Though many persons may not have a driver's license, the number of people who do not possess an alternate form of acceptable documentary proof (a "copy of a current utility bill, bank statement, government check, paycheck, or

⁷⁹ *The League of Women Voters v Blackwell*, 340 F Supp 2d at 826.

⁸⁰ *The League of Women Voters v Blackwell*, 340 F Supp 2d at 829.

⁸¹ *The League of Women Voters v Blackwell*, 340 F Supp 2d at 827

⁸² *The League of Women Voters v Blackwell*, 340 F Supp 2d at 828.

other government document that shows your name and address") likewise is highly likely to be very low.

Neither HAVA nor any other federal law prohibited reasonable identification requirement on first-time voters who registered by mail. Thus, the restrictions in Directive 2004-7 were likely to affect only a small number of voters, which is not the case with Section 523. Those individuals who did not have documentary proof with them and were also unable to recite a numerical identifier by memory were able promptly and easily to get an acceptable document or find out the necessary number. No similar opportunity, however, is afforded under Section 523. Because the placement of the burden of establishing identity on the voter was appropriate and because it provided the means for doing so were reasonable, the court in *League of Women Voters* held that the statute was acceptable under the Constitution and HAVA.⁸³

3. *Colorado Common Cause v Davidson.*

The present case is also distinguishable from *Colorado Common Cause*. Unlike the photo identification-only requirement of Section 523, *Colorado Common Cause* permitted the use of many forms of recognized identification that were not photo IDs. The State of Colorado recognized ten different forms of voter identification that included⁸⁴:

1. A valid Colorado driver's license;
2. A valid ID card from the department of revenue;
3. A valid U.S. passport;
4. A valid government employee ID, with photo;
5. A valid pilot's license;
6. A valid U.S. military ID, with photo;
7. A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the elector's name and address;
8. A valid Medicare or Medicaid card;
9. A certified copy of a birth certificate;
10. Certified documentation of naturalization.

⁸³ *The League of Women Voters v Blackwell*, 340 F Supp 2d at 829-30

⁸⁴ *Colorado Common Cause v Davidson*, 2004 WL 2360485 at 6 (Colo Dist Ct 2004).

The variety of identification accepted is such that registered Colorado voters who do not have acceptable photo identification can satisfy the identification requirement by showing any one of a number of non-photo forms of identification. In the present case, however, all forms of non-photo identification are excluded. Moreover, in *Colorado Common Cause*, even for the rare voter who has absolutely none of these forms of identification, he or she was still be able to cast a provisional ballot⁸⁵. Unlike *Colorado Common Cause*, Section 523 imposes much more restrictions on voters' rights and constitutes a severe burden on the right to vote, that triggers strict scrutiny.

The identification requirements of these cases are far less stringent than the photo identification-only requirement in the present case. Section 523 simply does not permit use of such alternative means of identification for purposes of in-person voting. Also, the regulatory restrictions in the *Bay County Democratic Party* and *League of Women Voters* cases had a very narrow and limited application, and did not significantly affect access to the ballot. Those cases dealt with implementation of the provisional ballot provisions of HAVA. At issue was HAVA's requirement that a first-time voter who has registered by mail without providing documentary proof of identity must present such proof in person at the polling place in order to vote for the first time. HAVA, however, permits a wide range of documents. The HAVA requirement affects only first time voters, and only that subset of such voters who registered by mail without including identity documentation. Unlike in *League of Women Voters*, Section 523 affects every single Michigan citizen who votes in person. The burden imposed by Section 523 is far more demanding and restrictive in comparison to that in *League of Women Voters*.

⁸⁵ *Colorado Common Cause v Davidson*, 2004 WL 2360485 at 6.

4. *Indiana Democratic Party v Rokita.*

In *Indiana Democratic Party v Rokita*, the Indiana voter identification law (SEA 483) requires Indiana citizens voting in-person at precinct polling places on Election Day, or casting an absentee ballot in person at a county clerk's office prior to Election Day, to present election officials with some form of valid photo identification, issued by the United States or the State of Indiana.⁸⁶ Recognizing potential Equal Protection issues, the Indiana Legislature in SEA 483 created exceptions to allow the receiving and casting of an absentee ballot sent by the county to the voter through the U.S. mail and voting by "a voter who votes in person at a precinct polling place that is located at a state licensed care facility where the voter resides." (hereinafter the "nursing home exception").⁸⁷ The plaintiffs challenged SEA 483 asserting that⁸⁸:

SEA 483 substantially burdens the fundamental right to vote, impermissibly discriminates between and among different classes of voters, disproportionately affects disadvantaged voters, is unconstitutionally vague, imposes a new and material requirement for voting, and was not justified by existing circumstances or evidence.

The federal district court in *Indiana* examined these arguments and nevertheless concluded that SEA 483's photo identification requirement for in-person voting did not impose a severe burden on the right to vote or violate the Equal Protection Clause, thus removing the necessity to subject the law to strict scrutiny. The court emphasized that the State of Indiana had an "important regulatory interest" in combating voter fraud, which was sufficient to justify the "reasonable, nondiscriminatory restrictions" contained in SEA 483. The court, however, pointedly noted⁸⁹:

⁸⁶ *Indiana Democratic Party v Rokita*, 2006 US Dist LEXIS 20321 (2006).

⁸⁷ *Rokita*, 2006 US Dist LEXIS at 14.

⁸⁸ *Rokita*, 2006 US Dist LEXIS at 7.

⁸⁹ *Rokita*, 2006 US Dist LEXIS at 143.

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.* [emphasis added]

Thus, in *Rokita*, the court illustrated that the "nursing home exception" prevented such an "injury in fact."

Rokita may be distinguished from this case because Section 523 does not contain a "nursing home exception" or any other type of exception to the photo identification requirement. Nursing home residents in Michigan similarly do not have the ability to obtain photo identification and are thus particularly disadvantaged. Under *Rokita*, the court held that the Indiana General Assembly was well within its powers to create a reasonable, limited exception to the photo identification requirements for nursing home residents without running afoul of the Fourteenth Amendment.⁹⁰ However, under Section 523, the photo identification requirements apply to all Michigan voters including nursing home residents. No exceptions or provisions have been made to keep Section 523 from being the burdensome and discriminatory restriction that *Rokita* managed to avoid. Furthermore, in Indiana, any individual who meets the age eligibility requirement to vote can obtain photo identification from the Indiana Bureau of Motor Vehicles *without paying a fee*.⁹¹ This avoids yet another obstacle in place for Michigan voters since an Indiana voter who does not want to be challenged in the voting process can obtain a photo identification for free. Without consideration of equal protection regarding nursing home residents and the cost of photo identification, Section 523 is clearly more burdensome than the Indiana statute.

⁹⁰ *Rokita*, 2006 US Dist LEXIS at 156.

⁹¹ *Rokita*, 2006 US Dist LEXIS at 135-36.

III. Because the text of Equal Protection Clause of the Michigan Constitution specifically references "political rights" this Court should hold that the Michigan Constitution requires a stricter standard to any limitations on the right to vote than is required under the United States Constitution.

In *Harvey v State*, this Court held that it has historically interpreted the Equal Protection Clause of the Michigan Constitution to be coextensive with its federal counterpart.⁹² When doing so, however, this Court was careful to note⁹³:

By this, we do not mean that we are bound in our understanding of the Michigan Constitution by an particular interpretation of the United States Constitution. We mean only that we have been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning on Const 1963, art 1, § 2 as well.

A discussion of cases involving other constitutional protections in which this Court has reached a different result under the Michigan Constitution than under the United States Constitution is instructive.

In *Sitz v. State Police*⁹⁴, the interplay between the Federal and State Constitutions was addressed when the Michigan Supreme Court affirmed the lower court's decision that sobriety checkpoints, although found constitutional by the United States Supreme Court, were in violation of the Michigan Constitution. *Sitz* involved a suit in which licensed Michigan drivers sought injunctive relief by challenging the constitutionality of random sobriety checkpoints. The United States Supreme Court held that the checkpoints did not violate the Fourth Amendment to the United States Constitution that prohibits unreasonable searches and seizures. On remand from the United States Supreme Court, however, the Michigan Court of Appeals held that the checkpoints violated Michigan's Constitution since there was no Michigan constitutional history

⁹² *Harvey v State*, 469 Mich at 6.

⁹³ *Harvey*, 469 Mich at 6, n 3.

⁹⁴ *Sitz v State Police*, 443 Mich 744; 506 NW2d 209 (1993).

for the suggestion that police are allowed to conduct suspicionless and warrantless seizures of automobiles.⁹⁵ The Michigan Supreme Court then affirmed the decision of the Court of Appeals

In interpreting Michigan's Constitution, this Court stated: "we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical"⁹⁶. Rather, the Court must look to the state's legislative intent in every incident and engage in a "searching examination to discover what law the people have made."⁹⁷ The judiciary must not be allowed to "engraft...more 'enlightened' rights than the framers intended."⁹⁸ On the same note, this Court indicated that it must recognize rights afforded to us by the Michigan Constitution even though it may be the case that the United States Supreme Court has either removed or not enlarged a specific right. *Sitz* goes on to explain that⁹⁹:

Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. *Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution.* It is only where the organic instrument of government purports to deprive a citizen of a right granted by the federal constitution that the instrument can be said to violate the constitution.

Hence, the United States Constitution should be treated as a "floor" when adopting State constitutional rules and thus the courts, taking into account the state constitutional history surrounding the right, may develop a higher "ceiling" of rights for individuals.

People v. Goldston reiterated that when expanding rights, we are permitted to interpret the Michigan Constitution "consistent with the United States Supreme Court's interpretation of the United States Constitution unless a compelling reason precludes us from doing so. However,

⁹⁵ *Sitz v State Police*, 193 Mich App 690; 485 NW2d 135 (1992)

⁹⁶ *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004).

⁹⁷ *Sitz* 443 Mich at 758.

⁹⁸ *Sitz*, 443 Mich at 758.

⁹⁹ *Sitz*, 443 Mich at 760. (emphasis added).

a 'compelling reason' should not be understood as establishing a conclusive presumption artificially linking state constitutional interpretation to federal law. Rather, we must determine what law the 'people have made.'¹⁰⁰

Since Michigan may implement stricter standards, it would be constitutionally permissible to place a higher "ceiling" on restricting fundamental rights, such as voting. The text of the Michigan Constitution would warrant this since its guarantee of equal protection contains an express recognition of political rights¹⁰¹:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or *political* rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

While the test of the United States Constitution's guarantee of equal protection of the laws has most certainly been held to protect a person's political rights, a similar, express reference in the text to a person's *political* rights is lacking¹⁰²:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition to the specific reference to a person's political rights in the Michigan Constitution provision regarding equal protection, Michigan case law holds that the State must demonstrate a *compelling* interest in order to prevail in enacting a law that impedes the constitutional right to vote.¹⁰³ "Any burden, however small, will not be permitted unless there is

¹⁰⁰ *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

¹⁰¹ Const 1963, art 1, § 2.

¹⁰² US Const, Am XIV, § 1.

¹⁰³ *Michigan State UAW Community Action Program Council v Secretary of State*, 387 Mich 506; 198 NW2d 385 (1972).

demonstrated a compelling state interest.¹⁰⁴ Therefore, any case, including *Burdick*, which applies the "reasonableness" standard in its place, would impose a lesser standard than required by the Michigan Constitution according to the text of the Michigan Constitution itself and as interpreted by prior decisions of this Court.

IV. The Equal Protection Clause does not permit the imposition of a burden on one group of voters that is not imposed on other voters. Section 523 subjects Michigan's electorate to disparate treatment because the statute applies only to voters who appear at a polling place to cast their vote, thus not requiring voters who cast their vote by absentee ballot to present photo identification. Imposing a burden on those who vote in one manner and not on those who vote in another manner, violates the Equal Protection Clause.

A. Standard of Review.

Constitutional issues are subject to de novo review.¹⁰⁵

B. Section 523 subjects Michigan's electorate to disparate treatment.

This is a case of first impression for this Court since there is no Michigan case that specifically addressed the issue now before the Court. However, the disparate impact doctrine, which is cited primarily in employment cases, should be held applicable to this case. In applying the disparate impact doctrine, the United States Supreme Court held that facially neutral practices that are "fair in form, but discriminatory in operation" were prohibited if the practices fell more harshly on a statutorily protected group and could not be justified by necessity.¹⁰⁶ In other words, the legality of a practice is determined by its consequences, not the motivation.

Utilizing the disparate impact doctrine to evaluate the constitutionality of Section 523, the Court should conclude that Section 523 on its face treats voters differently, favoring affluent voters over non-affluent voters; the haves over the have nots. It lowers the electoral standards by elevating those voters who have transportation and who can afford the \$25 fee for a State-issued

¹⁰⁴ *Secretary of State*, 387 Mich at 516.

¹⁰⁵ *Wayne County v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

¹⁰⁶ *Griggs v Duke Power*, 401 US 424, 431; 91 S Ct 849, 853; 28 L Ed 2d (1971).

ID. Previously, the United States Supreme Court stated that neither home site nor occupation, nor wealth, nor affluence, nor payment of a fee affords an acceptable basis for distinguishing between qualified voters within the State."¹⁰⁷

Contrary to the aforementioned precedents, this is exactly what will occur if Section 523 is implemented, because Section 523 metes out unequal treatment on several levels. First, it treats those who appear at the polls differently than those who vote via absentee voting procedures. Those who vote via absentee ballot do not have the requirement of producing the required photo identification. This fact is significant when paired with the reality that non-minority voters can avail themselves of the absentee procedure at a rate twice that of African Americans.¹⁰⁸

Second, empirical evidence reveals that those who do not have the required photo identification are mainly low income voters comprised mainly of women, racial and ethnic minorities, the disabled, and the elderly.¹⁰⁹ This evidence gives even more weight to the Equal Protection argument that Section 523 is unconstitutional.

¹⁰⁷ *Gray v Sanders*, 372 US 368, 380; 83 S Ct 801, 808; 9 L Ed 2d 821 (1963). See also *Harper v Virginia State Bd. of Elections*, 383 US 663, 667; 83 S Ct 1079, 1081 (1966).

¹⁰⁸ John Mark Hansen, Coordinator, Task Force on the Federal Election System, Report, note 5, at V-1, in Task Force Reports to Accompany the Report of the National Commission on Election Reform (Aug. 2001).

¹⁰⁹ *Infra* at 6.

V. Section 523 is unconstitutionally vague.

A statute or rule is impermissibly vague if it is 1) overbroad in its restriction of First Amendment freedoms, 2) does not give fair notice of the conduct proscribed, and 3) is so indefinite as to confer "unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed."¹¹⁰ In this case, Section 523 is void for vagueness because it does not provide fair notice to a prospective voter of what "other generally recognized picture identification" will be accepted or will not be accepted.

Under Section 523, each registered elector must identify himself or herself by presenting an official state identification card, an operator's or chauffeur's license, or *other generally recognized picture identification card...* (emphasis added).¹¹¹ Section 523 is unconstitutionally vague for the following reasons: First, it neither defines what an "other generally recognized picture identification card" may be nor does that Section vest the Secretary of State the authority to promulgate rules to determine what would be acceptable. This failure to define "other generally recognized picture identification card" is a grievous omission in the law that gives each precinct official, acting alone, the unfettered right to determine the fate of a persons fundamental right to vote. Whether a particular form of identification comports with the law's requirements is a pivotal question. Because there is no criteria in place, this omission in the law, has the real potential for being used as a backdoor means of imposing impermissible content discrimination.

¹¹⁰ *Michigan State AFL-CIO v Civil Service Comm'n*, 455 Mich 720, 751; 566 NW2d 258 (1997), citing *Wall v Attorney General*, 409 Mich 500, 592; 297 NW2d 578 (1980).

¹¹¹ MCL 168.523(1).

Second, in her letter to Attorney General Mike Cox requesting reconsideration of Section 523, the Secretary of State Terri Lynn Land candidly acknowledges that there is no objective standard in place to implement Section 523¹¹²:

In the event that circumstances change and section 523 is deemed enforceable, it would be *my intent and within my discretion* to broadly interpret the type of picture identification card that would be accepted under that act, which includes any "generally recognized picture identification card." (emphases added)

Secretary Land's foregoing statement clearly establishes that there is no objective standard in place to provide uniform and non-discriminating enforcement of the photo identification requirement of Section 523. While the current Secretary of State would like to interpret it broadly, there is nothing to prevent a subsequent Secretary of State from interpreting it differently. As the interpretation of the statute totally depends on personal discretion, different persons will have different interpretations for the photo identification requirement. When a fundamental right is at stake and where the statute regulating that fundamental right is inexplicit and vague such discretionary regulation is impermissible.

Third, Section 523 is more restrictive than HAVA. Michigan has implemented HAVA in 2003.¹¹³ While the Secretary of State has provided some examples of acceptable photo identification in its website,¹¹⁴ these examples refer to the implementation of HAVA requirements to be applied in federal elections only. The purpose of Section 523 would be to impose requirements that are more strict than HAVA provides. As such, the examples for

¹¹² Michigan Secretary of State Terri Lynn Land's letter to Michigan Attorney General Mike Cox, dated April 20, 2006. (See Appendix B).

¹¹³ See Michigan Secretary of State's website: www.michigan.gov/sos/0,1607,7-127-1633-77937--,00.html.

¹¹⁴ The "Examples of Acceptable Photo Identification " include driver's license with photo (any state); personal identification card with photo (any state); government issued photo identification card; passport; student identification card with photo; credit or automated teller card with photo; military identification card with photo; employee identification with photo. See http://www.michigan.gov/documents/Fed_ID_Req_105890_7.pdf

implementing HAVA listed cannot be used to interpret the "generally recognized picture identification card" under Section 523.

Fourth, the affidavit requirement is also vague. Since the photo identification requirements has yet to be enforced, there is no guidance as to what is required of the voter signing the affidavit or what type of questions the voter will be subjected to.¹¹⁵ Therefore, Section 523 is manifestly unconstitutional and void on its face for indefiniteness and uncertainty of those generally recognized photo identification, as well as the content and implementation of the affidavit.¹¹⁶

VI. The Twenty-Fourth Amendment, the Equal Protection Clause, and 42 USC §1973(h) prohibit the use of a poll tax since voter qualifications have no relation to wealth. Section 523 requires voters to spend 10-25 dollars to acquire photo identification while these otherwise eligible voters have neither the need nor the ability to afford a photo ID. The cost imposed on voters by Section 523 constitutes a *de facto* poll tax on the fundamental right to vote.

A. Standard of Review.

Constitutional issues are subject to *de novo* review.¹¹⁷

B. Section 523 imposes an unlawful poll tax.

Requiring an otherwise eligible voter to purchase a state-issued photo identification card is tantamount to a poll tax. The Twenty-Fourth Amendment to the United States Constitution expressly provides that¹¹⁸:

The right of citizens of the United States to vote...shall not be denied or abridged by the United States or by any State by reason of failure to pay any poll tax or other tax.

¹¹⁵ See Argument II.D.1. of this brief.

¹¹⁶ *Garrett v State*, 391 SW2d 65 (1965).

¹¹⁷ *Wayne County v Hathcock*, 471 Mich 445, 455: 684 NW2d 765 (2004).

¹¹⁸ US Const, Am XXIV. See also 42 USC 1973(h); *Harper v Virginia State Board of Elections*, 383 US 663, 666 (1966) (striking down a \$1.50 poll tax by finding that poll taxes lack any relation to wealth).

If required as a precondition for voting, photo identification would operate as a *de facto* poll tax that is likely to disenfranchise low-income voters. The Report of the 2005 Commission on Federal Election Reform suggests that photo identification be available free of charge. In Michigan, however, it costs \$10 to obtain a State identification card and \$25 to obtain a driver's license. But, the real costs associated with obtaining the requisite photo identification necessary to vote are much higher. Since these State-issued photo identification cards are only issued at Secretary of State offices, which may be far from voters' residences and workplaces, individuals seeking such ID's will have to incur the costs of transportation and the costs associated with taking time off from work. For some individuals, such as the disabled or indigent, who would normally be allowed to register at disability or other social services agencies, the transportation costs imposed upon them serve as a real hindrance in securing their fundamental right to vote.¹¹⁹ For other individuals, these costs require taking unpaid leaves of absence from work, if such leave is available to them in the first place, or vacation time. Furthermore, although most States prohibit employers from penalizing employees who take time off from work to vote, no State provides similar protection for those individuals who take time off work to obtain a State issued photo identification, in order to be able to vote.

Associated with the costs of obtaining a photo identification are the costs that one must pay to obtain the supporting documents necessary in establishing proof of identity. These documents include: certified copies of birth certificates (which range from \$10 to \$45), passports (\$85 for first issuance, \$55 for renewal, \$145 for expedited process), or certified naturalization papers (\$19.95). Unless Michigan decides to waive the costs of these other forms of

¹¹⁹ Statistics show that racial minorities are "more than three times likely to register to vote at a public assistance agency, and that whites are more likely to register when seeking driver's licenses. Carter-Baker Dissent at 6.

identification, the indirect costs of obtaining photo identification will be even greater than the actual cost of the required identification. These imposed costs would restrict the voting rights of poor Americans who may be forced to forego obtaining mandatory identification in order to obtain the necessities that day to day life demands. Section 523 effectively functions as a poll tax given that "wealth or fee paying has...no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."¹²⁰

¹²⁰ *Harper*, 383 US at 670.

CONCLUSION

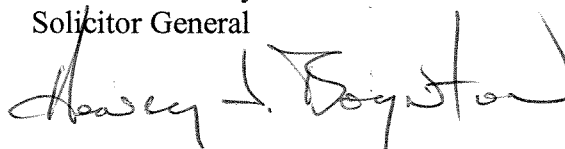
Because the photo identification requirements of Section 523, MCL 168.523, are already in effect, the period of time during which this Court is authorized to issue an advisory opinion under Const 1963, art 3, § 8, has expired. Therefore, this Court lacks jurisdiction to issue an advisory opinion in this matter.

Should this Court, however, determine that it does have jurisdiction to issue an opinion in this matter then it should hold that the photo identification requirements of Section 523 are unconstitutional for the reasons set forth in this brief.

Respectfully submitted,

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Dated: July 19, 2006
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